

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DUANE DUNN,

Defendant-Appellant.

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UNPUBLISHED  
December 9, 2003

No. 243699  
Calhoun Circuit Court  
LC No. 02-000649-FH

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle under the influence of intoxicating liquor (OUIL) (third offense), MCL 257.625, and failure to report an accident resulting in damage to fixtures, MCL 257.621. The trial court sentenced defendant to one year in jail and 60 months' probation for the OUIL conviction and ninety days in jail for the failure to report damage to fixtures conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecutor improperly shifted the burden of proof during closing argument, and that this misconduct denied his right to a fair trial. Specifically, defendant contends that the prosecutor's closing argument improperly shifted the burden of proof by questioning why he did not have his father and sister, who were at the scene, testify that he was not the driver. Defendant also takes issue with the prosecutor's similar comment during rebuttal argument which implied that his father and sister should have testified on his behalf to support his theory that he was not the driver. We disagree. This Court reviews issues of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 594; 629 NW2d 411 (2001).

Our Supreme Court has held that "where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Moreover, "although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *Id.* "When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *Id.* at 116.

In the instant case, in order to refute the prosecution's theory that defendant drove his truck into a fire hydrant, defendant introduced the alternate theory that someone else was driving his truck when it struck the fire hydrant. Defendant advanced his alternate theory through his cross-examination of prosecution witnesses designed to call into question their identification of defendant, and his presentation of several eyewitnesses who testified that they were unable to identify the driver of the truck. Additionally, defendant argued in closing that it was the prosecutor who should have called defendant's father to testify, and that she failed to do so because his testimony would be unfavorable to her theory of the case.

Here, we find that the comments defendant finds objectionable, regarding his failure to call his father and sister as witnesses, were designed to show that defendant's alternate theory was not supported by corroborating evidence. By making this argument, the prosecutor was commenting on the validity of the theory advanced by defendant. *Id.* at 115. Consequently, the prosecutor's comments during closing argument regarding defendant's failure to call his father and sister, who were in a position to confirm defendant's alternate theory, did not impermissibly shift the burden of proof to defendant.

Because defendant advanced an alternate theory of the case, the prosecutor was free to comment on the validity of that theory without impermissibly shifting the burden of proof. Moreover, in addition to the allegedly improper comments, the prosecutor specifically responded to defendant's objection by reiterating to the jury that she had the burden of proving defendant's guilt beyond a reasonable doubt, and that she accepted that burden. Further, the trial court instructed the jury that the prosecutor had the burden of proving each element of the crime beyond a reasonable doubt, and that defendant was not required to prove his innocence. The trial court's instruction that the attorneys' arguments were not evidence also mitigated any prejudice. Accordingly, the prosecutor's comments did not constitute error requiring reversal, and defendant was not denied a fair and impartial trial.

Defendant next argues that the prosecutor engaged in misconduct that denied his right to a fair trial by characterizing defense counsel as a good showman and arguing that defense counsel was trying to confuse the jury by focusing on mistakes in the investigating police officer's report. We disagree. Defendant failed to timely and specifically object to preserve this claim of prosecutorial misconduct for review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Accordingly, to avoid forfeiture under the plain error rule, defendant must demonstrate plain error which affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although defendant characterizes the prosecutor's comments as an attempt to mislead the jury, the prosecutor was merely arguing that the facts and law were in her favor. This Court has stated that "it is improper for the prosecutor to engage in arguments which attack defense counsel," because "such arguments undermine the defendant's presumption of innocence and impermissibly shift the jury's focus from the evidence itself to defense counsel's personality." *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991). However, this Court has also stated that "remarks which might otherwise be improper may not require reversal when they address issues raised by defense counsel." *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

In the instant case, the prosecutor's comments were intended to focus the jury on the evidence presented at trial, and to discourage them from being swayed by defense counsel's "showmanship" during closing argument. Further, the prosecutor's comment made during rebuttal regarding defense counsel's attempt to confuse the jury by highlighting mistakes in the police officer's report was made in direct response to defense counsel's comments at trial and during closing argument that the police officer had conducted a substandard investigation. Defendant failed to demonstrate plain error affecting his substantial rights, and is not entitled to relief on this basis. *Carines, supra*.

Defendant next argues that his due process rights were violated when the prosecutor improperly commented on his post-*Miranda*<sup>1</sup> silence. We disagree. It is well settled that "the use of a criminal defendant's silence 'at the time of arrest and after receiving *Miranda* warnings' for impeachment purposes" amounts to a due process violation. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001), quoting *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). However, contrary to defendant's assertion, reference was never made to his post-*Miranda* silence.

During cross-examination of the investigating police officer, defense counsel attempted to denigrate the officer's investigative efforts by eliciting testimony that the officer did not ask defendant if he was the driver of the truck, or if he had consumed alcohol that evening. At a sidebar conference, the prosecutor expressed a desire to address that testimony on redirect examination, arguing that the way the questions were framed implied that the police officer conducted a substandard investigation, when in reality, the police officer did not ask defendant those questions because defendant invoked his *Miranda* rights. To allow the prosecutor to demonstrate that the police officer was not derelict in his duties, without referring to defendant's invocation of his *Miranda* rights in response to the police officer's questions, the trial court formulated two questions for the prosecutor to ask the police officer, to which the officer could respond with a "yes" or "no" answer.

On redirect examination, the prosecutor and the police officer engaged in the following exchange:

Q. [D]o you recall yesterday on cross-examination [defense counsel] asked you if you had asked the defendant whether he was the driver of the truck or whether he had consumed alcohol?

A. Yes.

Q. After the defendant was arrested, did you in fact attempt to ask those questions of defendant?

A. Yes.

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The prosecutor then proceeded to another line of questioning. The prosecutor never elicited testimony concerning defendant's post-*Miranda* silence; therefore, the peculiar circumstances of the instant case do not support a finding that defendant's right to remain silent was violated.

Finally, defendant argues that he was denied his due process right to a fair trial because of the interjection of inadmissible hearsay evidence. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). At trial, the investigating police officer testified that he asked defendant's sister if she knew who had been driving the truck, and that she responded that her brother, defendant, was the driver. Defense counsel objected on the grounds that the officer's testimony was inadmissible hearsay that did not fall within a recognized exception to the hearsay rule under MRE 803. The trial court sustained the objection, and instructed the jury to disregard the testimony.

MRE 801 provides that hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted. MRE 802 provides that hearsay is inadmissible unless it falls within a recognized exception under MRE 803. In the instant case, the police officer's testimony that defendant's sister told him that defendant was the driver of the truck was offered into evidence to prove that defendant was in fact the driver of the truck. The trial court properly determined that the statement did not fall within a recognized exception to the hearsay rule, and sustained defense counsel's objection on that basis. Additionally, the trial court gave the jury a curative instruction. Because jurors are presumed to follow their instructions, no error requiring reversal occurred and defendant was not denied his right to a fair trial. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio